IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25/02/2003

Coram

The Honourable Mr. Justice A.S. VENKATACHALAMOORTHY
and
The Honourable Mr. Justice M. CHOCKALINGAM

A.S. No.424 of 1985

Palaniswami .. Appellant

-Vs-

1. P.Vellingiri Gounder

2. Shanmughasundaram Rajendran

3. Parthiba Mahendran

4. Sethuramalingam

5. Thondamuthur Cooperative
Primary Land Development
Bank Ltd,
Thondamuthur,
Coimbatore District. .. Respondents

Appeal Suit against the judgment and decree made in O.S. No.967 of 1
980 dated 31.8.1983 on the file of the Subordinate Judge, Coimbatore.

!For Appellants : Mr.S.Parthasarathy

^For Respondents : Mr.M.B.Dominique
1 to 4

:JUDGMENT

A.S. VENKATACHALAMOORTHY, J.

The plaintiff in O.S.No.967 of 1980 on the file of the Subordinate
Judge, Coimbatore is the appellant.

2. The case of the plaintiff can be set out as hereunder:-
The plaintiff and the first defendant are brothers and sons of
one Patti Gounder who died in the year 1977. The defendants 2 to 4 are sons
of the first defendant.
The plaint 'A' and 'B' schedule and other items of properties

belonged to the plaintiff, the first defendant and their father late Patti Gounder. There was a partition in the family on 31.3.1955. According to the plaintiff, Patti Gounder assured at that time that in respect of his share, he would see that after his demise the properties go to both of them, namely, the plaintiff and the first defendant in equal share. Only because of that, the plaintiff agreed for the 1955 partition and allotment of one share to the first defendant, even though under law, the first defendant was not entitled to any share after execution of the deed of surrender in the year 1950. After the partition in the year 1955, Patti Gounder was in possession and enjoyment of his share till his death.
As per his assurance, late Patti Gounder executed a registered Will dated 4.6.1975 bequeathing the plaint schedule properties and other items of the properties, which he got in the family partition, to the first defendant and the plaintiffs. Even after the partition, Patti Gounder was taken care of only by the plaintiff, who was assisting him in cultivating the lands and collecting rent from the house properties. While so, the first defendant under the pretext of taking care of his father took him to his house and the plaintiff had no suspicion at that time. The plaintiff now understands on enquiry that the first defendant prevailed upon Patti Gounder to execute the second Will and he (Patti Gounder) had executed a Will bequeathing the plaint schedule properties in favour of his three sons, namely, defendants 2 to 4 to be enjoyed by them during their life time and thereafter to their children absolutely and cancelling the earlier Will executed in favour of the plaintiff and the first defendant. According to the plaintiff, the second Will is not a true and valid Will and it was brought about by the first defendant to defeat the rights of the plaintiff. The second Will is in violation of the assurance and undertaking given by the father Patti Gounder at the time of partition. It was the plaintiff who was looking after Patti Gounder for a very long time and Patti Gounder had no ill-feeling against the plaintiff. After Patti Gounder executing the first Will, he was not in sound health and that was the reason he was not conducting the Court proceedings and in fact, it was the plaintiff who was conducting the same. The second Will should have been brought about by undue influence and coercion by the first defendant who had vengeance against the plaintiff. Till Patti Gounder left the plaintiff's house early in the year 1976, there was no dispute or quarrel between him and Patti Gounder. Under the guise of looking after his father for some time, during his last lap of life, the first defendant had brought about the second Will into existence and claimed false rights taking advantage of the old age of Patti Gounder. In fact, Patti Gounder would not have voluntarily executed the second Will. After the death of Patti Gounder, the first defendant using his influence forcibly entered into the plaint ' A' schedule property and took possession and enjoyment of the same. The first defendant is liable to surrender the 'A' schedule property and also to repay the mesne profit from the date of death of Patti Gounder.

3. A common written statement has been filed on behalf of the defendants 1 to 4. The claim that the first defendant was leading a wavered life and hence with a view to save the properties, the surrender deed was executed by the first defendant has been denied. The circumstances under which the said document came to be executed has been explained as under.

According to these defendants, that was done under the advise given by the astrologers to the father Patti Gounder. The advise being that the first defendant should not hold any joint family property as he was running bad time for some years. The release deed executed in the year 1950 was only a nominal one and was not intended to be acted upon and in fact, it was never acted upon. The first defendant had been all along in possession and enjoyment of the properties along with the father Patti Gounder and the plaintiff notwithstanding the said release deed until the properties were partitioned under the partition deed dated 31.3.1955. The claim of the plaintiff that at the time of partition the deceased Patti Gounder made an assurance has been denied. The execution of the Will Ex.A-5 dated 4.6 .1975 has been admitted. According to these defendants, subsequent to the said Will, the deceased Patti Gounder entrusted a sum of Rs.25,000/- to his daughter Kamalammal to be kept by her for his benefit. The deceased Patti Gounder, after executing the first Will, called upon Kamalammal to pay back the said amount. She had represented that the said amount was taken away by the plaintiff and that she was not in a position to get back the amount from him. The deceased Patti Gounder thereafter requested the plaintiff to return the said amount, but the plaintiff refused. In view of this, the relationship between the plaintiff and the deceased Patti Gounder got strained. The deceased Patti Gounder distressed by the conduct of the plaintiff desired to execute the second Will Ex.B-6 dated 24.4.1976 which is the subject matter of this suit. The deceased Patti Gounder left the plaintiff and began to live with the first defendant out of his own free will and accord. After leaving the plaintiff, Patti Gounder never returned to him till his last breath. Till 1975 Patti Gounder was living by himself, then with the plaintiff and finally, he came and joined the first defendant. The first defendant looked after Patti Gounder, provided him with necessary medical care and assisted him in all ways. In fact, a sum of Rs.25,000/- was spent towards the treatment, apart from meeting the entire funeral expenses. It was he who conducted the last ceremonies spending Rs.25,000/-. Because of the conduct on the part of the plaintiff, namely, his refusal to pay the sum of Rs.25,000/-, the deceased Patti Gounder executed the second Will and settled the properties in favour of the defendants 2 to 4 and their children. The Will is genuine, true and valid one and not brought about by fraud or undue influence or unfair means as claimed. The properties bequeathed under the second Will Ex.B-6 being the absolute properties of Patti Gounder, he had every right to deal with the properties in any manner he liked. The plaintiff has not sought to set aside the second Will on the ground of fraud or undue influence as alleged in the plaint and a mere suit for possession without setting aside Ex.B-6 Will dated 24.4.1976 is not maintainable in law. Hence, the suit as prayed for is not valid and the same is liable to be dismissed in limine.

4. The trial Court tried the suit along with the other suit, namely, O.S.No.777 of 1977, which was a suit filed by the sons of the plaintiff, questioning the validity of Ex.A-2 partition deed entered into between Patti Gounder and two sons, namely, the plaintiff and the first defendant. For the purpose of convenience and clarity, this Court has already delivered a separate judgment in the appeal in A.S.No.79 4 of 1983 which was filed against the judgment and decree made in O.S. No.777 of 1977.

5. The learned counsel appearing for the plaintiff would submit that the deceased Patti Gounder executed the Will Ex.A-5 dated 4.6.1975 as per his assurance given at the time of partition on 31.3.1955 and that the first defendant took the deceased Patti Gounder to his house somewhere in the beginning of 1976 and by coercion and undue influence and taking advantage of his feeble health,made late Patti Gounder to execute the Will in question, namely, Ex.B-6. When the relationship between plaintiff and late Patti Gounder was cordial, there was no reason whatsoever for the deceased Patti Gounder to cancel his earlier Will Ex.A-5 and execute the Will Ex.B-6 bequeathing the entire properties to the defendants 2 to 4 and their children. The exclusion of one son completely would be a suspicious circumstance particularly when by the first Will, he bequeathed his properties to both the plaintiff and the first defendant equally. Yet another submission has been made to the effect that mere registration of Ex.B-6 would not be the conclusive proof of its genuineness and mental capacity of deceased Patti Gounder to dispose of his properties.

6. On the other hand, the learned counsel appearing for the defendants 1 to 4 would contend that it is not as if the defendants solely rest their case on the mere factum of registration of the Will. An argument has been advanced to the effect that the plaintiff had kept quite for years before instituting the suit which would show that the filing of the suit was only an after thought. The counsel would further contend that a careful reading of the plaint as well as the evidence of the plaintiff and his son would clearly show that there was love lost between the plaintiff and the deceased Patti Gounder. Pointing out the testimony of the attesting witness, the learned counsel would contend that the sole reason for the Patti Gounder executing the second Will was that the plaintiff refused to pay the sum of Rs.25,00 0/- due to the deceased Patti Gounder. The deceased Patti Gounder was in a sound disposing state of mind and there was no pleading that he was not mentally alert and he was not in a sound disposing state of mind.

7. Certain legal position, as enunciated by the Courts from time to time, has necessarily to be borne in mind and about which we refer to hereinafter. The exact words found in those judgments are reproduced here for clarity and better understanding.

Whether a man at the time of making his Will had testamentary capacity, whether a Will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. (WILLIAM ROBINS v. NATIONAL TRUST CO LTD (AIR 1927 P.C. 66)).

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. G. THATAIAH v. T.V. SUBBAIAH (1 968 (3) S.C.R. 473). That inevitably would be a question of fact in each case. (H.VENKATACHALA v. B.N. THIMMAJAMMA (AIR 1959 S.C 443)).

It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence and that would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. (HARMES v. HINKSON (AIR 1946 P.C. 156)).

The theory of improbability remains to be considered; and the first observations which their Lordships have to make is, that, in order to prevail against such evidence as has been adduced by the Respondent in the case, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility.
In a case where the execution is proved by cogent and acceptable evidence, the Court should not disbelieve the Will on the basis of socalled suspicious circumstances unless those circumstances would render the execution of the Will an utter improbability very near to impossibility. (CHOTEYNARAIN SINGH v. MUSSAMAT RATAN KOER ((1895) 22 IND APP 12)).

It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party. (KALYAN SINGH v. CHHOTI (AIR 1990 S.C. 396)).

The testator who has full testamentary powers and a disposing mind cannot be dictated by the Court as to what is a fair and an unjust disposition. The Will is the will of the testator and he has, under the law, the freedom to give his property to whomsoever he likes. .. .. But, once it is established that the testator was free and had a sound disposing mind, then it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to the Court's own standards. .. .. Such wrongs, however grievous, are not for the temporal courts of justice to correct and are better left to Him Who adjust all wrongs and non-justiciable inequities, and under whose munificence the testator and the disinherited alike live and die." (AJIT CHANDRA v. AKHIL CHANDRA (AIR 1960 CAL 551)).

There may, however, be cases in which execution of the Will may be surrounded by suspicious circumstances. The alleged .. .. ..; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; (Bench of 3 Judges in H.VENKATACHALA v. B.N. THIMMAJAMMA (AIR 1959 S.C 443)).

But even where there were suspicious circumstances and the propounder succeeded in removing them, the court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations. (As held by Their Lordships K.N.WANCHOO, K.C.DAS GUPTA, J.C.SHAH and RAGHUBAR DAYAL, JJ. in PURNIMA DEBI v. KHAGENDRA NARAYAN (AIR 1962 S.C. 567)).

Even though it cannot be said to be hard and fast rule yet when disinheritance

is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the Courts failed to be alive to it then their orders cannot be said to be beyond review. (RAM PIARI v. BHAGWANT (AIR 1990 S.C. 1742)).

As to the first circumstance, we would observe that this should not raise any suspicion, because the whole idea behind execution of Will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of Will; of course, it may be that in some cases they

are fully debarred and in others only partially. (RABINDRA NATH MUKHERJEE v. PANCHANAN BANERJEE (AIR 1995 S.C. 1684)). [Note: AIR 1959 S.C. 443 is not referred to].

Some of the suspicious circumstances of which the Court has taken note are:(1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property. (V.S.MANE v. R.V. GANESHKAR (AIR 1995 S.C. 2086)). [Note: The ruling reported in AIR 1995 S.C. 1684 was not brought to the notice of the Court. But AIR 1959 S.C. 443 is referred to].

Therefore, it could not be taken as a circumstance to show that the Will was unnatural by observing that she was more deserving. It is a question which lies squarely within the pure discretion of the executant of the Will. The uneven distribution of assets among children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the Will. (SUNDARESA PAI v. SUMANGALA T.PAI (2 001 AIR S.C.W. 4951)). [Note: The rulings reported in AIR 1959 S.C. 443, AIR 1995 S.C. 1684 and AIR 1995 S.C. 2086 were not brought to the notice of the Court].

The suit Will is dated the 3rd August 1904. On the first August 190 4, the testator had executed a Will more favourable to his widow and less favourable to the plaintiff and, in our opinion, no satisfactory explanation has been given why the testator so soon changed his mind. (EALAMANCHILI CHINNA BASAVAYYA v. EALAMANCHILI BAPAMMAD (Vol.X INDIAN CASES 420)).

It nevertheless seems to me that the difference between two alleged Wills, especially if they have been executed at a short interval is a matter which the Court may legitimately take into account in determining whether the later will represents the conscious and voluntary act of the testator. (SADACHI AMMAL v. RAJATHI AMMAL (AIR 1940 MADRAS 3 15)).

8. The legal position that can be deduced can be set out as under:-
(a) The will is the will of the Testator and he has, under the law, freedom to give the property to whomsoever he likes.
(b) Once it is established that the Testator was free and had sound disposing mind, it is no longer the duty of the Court to go further to inject its own ethics of what is or is not moral or fair disposition, according to the Courts' own standards.

(c) What are the suspicious circumstances, must be judged in the facts and circumstances of each particular case, inevitably a question of fact in each case. (Certain examples are given in the decision reported in AIR 1959 S.C. 443).
(d) Broadly speaking, the uneven distribution of assets among children by itself cannot be taken as a suspicious circumstance. In such an event, the standard of scrutiny has to be different than in the ordinary cases more so when no reasons are given for such disposition.
(e) In relevant circumstances or in a given situation, unnatural or improbable or unfair disposition may give suspicion to the Court when it will be a suspicious circumstance.
(f) When a second Will is executed within a very short duration after the first Will, say within a few days or few weeks and whereunder there is complete exclusion of one branch (which branch was given a share under the first Will), a suspicion is bound to arise and that suspicious circumstance has to be satisfactorily explained by the person concerned.

9. Coming to the present case, the appellant put forth three submissions:-
(1) Patti Gounder at the time of alleged execution of the second Will was not in a sound disposing state of mind and that mere execution and registration of a Will is not a conclusive proof of the fact that the testator was in a sound disposing state of mind at the time of execution of the Will and the same was not brought about by undue influence or coercion.
(2) The Will has not been properly proved to the satisfaction of the Court; and
(3) When Patti Gounder executed Ex.A-5 Will dated 4.6.1975 bequeathing his properties to both the plaintiff and the first defendant, there was no reason whatsoever to change his mind within a short period to execute the suit Will Ex.B-6 dated 24.4.1976. This is a suspicious circumstance and the first defendant has not dispelled the same.
10. If we turn to the plaint, what has been stated by the plaintiff is that Patti Gounder was not in sound health and that the first defendant taking advantage of the feeble and weak intellect of Patti Gounder by coercion and undue influence brought about the alleged second Will. During trial, the plaintiff told the Court that in the year 19 76 Patti Gounder was not alright and at the time of executing the suit Will in April 1976, he was not mentally alert and in a sound disposing state of mind. The exact words employed by him are " ". Again in the later part of the cross-examination,
he has stated that his father was sometime used to be mentally alert and sometime he was not and he was not in a position to do anything by himself. It could be seen what he deposed before Court is different from the averment made in the plaint. The son of the plaintiff by name Shanmugasundaram has deposed before Court that his grand father Patti Gounder was not mentally alright for three years before his death and this is not the case of plaintiff or the defendants 1 to 4.
On the other hand, in the written statement, the first
defendant has stated that Patti Gounder executed the second Will out of his own free will and volition and same is genuine, true and valid and that the same was not brought about by fraud or undue influence or unfair means as alleged in the plaint. Before Court, the first defendant has clearly

testified that his father was mentally alright and that the claim of the plaintiff that the execution of the Will by coercion or undue influence is totally false.

11. The task of this Court in giving a finding on this issue is made easy in view of the availability of the testimony of Nanjappa Gounder examined by the defendants. D.W.2 is one Nanjappa Gounder who had attested the Will in question. This witness has categorically stated that at the relevant time, Patti Gounder was keeping good health. He denied the suggestion put to him in cross-examination that Patti Gounder was not mentally alright at the time of execution of the second Will Ex.B-6. If this witness was the attesting witness only for the Will in question Ex.B-6, then this Court might have some hesitation to accept his testimony. But this witness attested both the Wills Ex.A-5 and Ex.B-6. This would only show that the testator Patti Gounder had confidence in this witness and that was why at his request, he had attested the Will. That apart, we also perused the crossexamination of this witness and we do not find anything which would persuade this Court to reject his testimony.

12. Added to the above, two other reasons, this Court is inclined to take note of. Ex.B-6 Will was executed in April 1976 and Patti Gounder was died in October 1977, that is about 1-1/2 years after execution of the second Will. If really Patti Gounder was compelled to execute the Will, he would have gone back and executed another Will as he desired. We have also the evidence of concerned Sub Registrar, who registered the Will Ex.B-6. On a perusal of the testimony of the said witness, we can safely take it that the said Officer while registering the documents, followed the procedures. From her evidence it is clear that every time before registering a document, she made it sure that the same was executed by the person concerned and the executor knew the contents of the same and in case of any doubt about the mental capacity of the executor, she used to decline to register. We have no reason to reject this part of the evidence of the Sub Registrar. For all the above reasons, this Court comes to the conclusion that Patti Gounder executed the Will Ex.B-6 while he was in a sound disposing state of mind and he was not subjected to any undue influence or coercion from the first defendant.

13. The learned counsel for the appellant would contend that mere registration would not show that the Will is a genuine one and was executed by the testator in a sound disposing state of mind. Inasmuch as we come to the conclusion that the testator Patti Gounder executed second Will Ex.B-6 while he was in a sound disposing state of mind and not being subjected to any coercion or undue influence by the first defendant and further that, he had reason to execute the second Will ignoring the plaintiff and his sons, the said submission is of no avail.

14. The next question is whether any material is available on record to show as to why Patti Gounder executed the second Will in question (Ex.B-6). The case of the first defendant is that Patti Gounder had earlier entrusted a sum of Rs.25,000/- with his daughter Kammammal, the 15th defendant and that amount was taken away by the plaintiff. When Patti Gounder wanted the plaintiff to return the said amount to him, he did not do so, because of which

ther e was a strained relationship between Patti Gounder and the plaintiff. Of course, the plaintiff in his evidence before Court categorically denied the same. In the face of conflicting evidence between the parties, the evidence of Nanjappa Gounder, the attesting witness, would be very relevant and useful. This witness has clearly stated that Patti Gounder told him that since the plaintiff had taken away the money from Kamalammal and failed to return same to him, he was writing the second Will Ex.B-6. This claim of this witness has not been seriously challenged. Only one answer has been elicited in cross-examination to the effect that this witness Nanjappa Gounder was not personally aware about the payment of Rs.25,000/- to Kamalammal by Patti Gounder.

15. Yet another circumstance which the Court is inclined to point out is that there was a strained relationship between the plaintiff and Patti Gounder. In paragraph 9 of the plaint, it is stated as under:-
"The plaintiff now learns on enquiry that the first defendant has prevailed upon the aged Patti Gounder to execute a second Will whereby he got Patti Gounder bequeath the plaint schedule properties in favour of his three sons defendants 2 to 4 herein and purporting to cancel the earlier will executed in favour of the plaintiff and the first defendant."
(emphasis supplied)

But before Court, at least in two places, he has stated that he came to know about the Will Ex.B-6 after the death of the father. Patti Gounder died on 23.10.1977 and the suit came to be filed nearly after three years. A reading of the deposition of the plaintiff would show that he came to know about the Will Ex.B-6 shortly after the death of Patti Gounder. If that is so, then as to why he waited till July 1980 to file the suit remains a mystery. Obviously the plaintiff's filing the suit was only an after thought, viz., to gain unlawfully, if possible. From the above discussion, this Court comes to the conclusion that there was strained relationship between the plaintiff and Patti Gounder after the execution of the first Will Ex.A-5 and only because of which the second Will Ex.B-6 came to be executed and filing of this suit was purely with ulterior motive.

16. The learned counsel appearing for the appellant would contend that the Courts have held that when two Wills are executed within a short interval, that will be a suspicious circumstance and it is the duty of the person who claims under the Will to satisfy the Court. There are two reported rulings as referred to supra. In the first case reported in Vol.X INDIAN CASES 420 (EALAMANCHILI CHINNA BASAVAYYA v. EALAMANCHILI BAPAMMAD), it could be seen that the first Will was executed by the testator, who was aged 80 years, on 1st August 1904 and the second Will was executed on 3rd August 1904, that is to say, there was a gap of only two days. For this reason and for other reasons, the Court entertained a doubt and held that the second Will has not been proved. In the other case, namely, SADACHI AMMAL v. RAJATHI AMMAL (AIR 1940 MADRAS 315), the first Will was executed on 7th August 1 930 and the second Will was executed on 2nd September 1930 and the registration of the second Will was done at the house. The testator died at about 2.00 A.M. on 5th September 1930. Thus, there was an interval of about three weeks between the two Wills that was pointed out to be a suspicious circumstance, as the

interval between the execution of these two Wills was too short.

17. Coming to the present case, as already stated, the the first Will Ex.A-5 was executed on 4.6.1975 and the second Will Ex.B-6 was executed on 24.4.1976, that is to say after a period of about ten months. We have already come to the conclusion that after the execution of the first Will, the relationship between the plaintiff and Patti Gounder became strained and only because of which Patti Gounder executed the second Will bequeathing the properties to his grand sons through the first defendant.

18. In this view of the matter, this Court is of the view that there is no merit in this appeal and accordingly, the same is dismissed. No costs.

Index: Yes
Website: Yes
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To
1. The Subordinate Judge, Coimbatore.
2. The Record Keeper, V.R.Section, High Court, Madras.

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